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Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 68

PUGET SOUND STEVEDORING COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Facts of the case	2
Statute under which jurisdiction of Supreme Court is invoked	5
Statutes of the State of Washington here challenged	5
Laws of Washington 1933	6
Laws of Washington Extraordinary Session 1933	6
Laws of Washington 1935	7
Judgment of the Supreme Court of the State of Washington	8
Court appealed from is highest court of the State of Washington	9
How federal question is raised	10
Questions involved are substantial as shown by repeated decisions of this Court	14
Exhibit "A"—Opinion of the Superior Court of the State of Washington	15
Exhibit "B"—Opinion of the Supreme Court of the State of Washington	17

Table of Cases Cited.

Bryant v. *Zimmerman*, 278 U. S. 63	14
Cascade Telephone Co. v. *State Tax Commission*, 176 Wash. 616, 30 Pac. (2d) 974	8
Colgate v. *Harvey*, 296 U. S. 404	15
Di Santo v. *Pennsylvania*, 273 U. S. 34	15
Fisher's Blend, Inc., v. *Tax Commission*, 297 U. S. 650, reversing 182 Wash. 163, 45 Pac. (2d) 942, 49 Pac. (2d) 115	8, 9, 15
Foster v. *Davenport*, 22 How. 244	14
Gloucester Ferry v. *Pennsylvania*, 114 U. S. 196	14
Gulf Refining Co. v. *United States*, 269 U. S. 125	9

Page.

Hughes v. *Minnesota*, 272 U. S. 469 15
McCall v. *California*, 136 U. S. 104 15
National Labor Board v. *National New York Co.*, 86 F. (2d) 98 15
Northern Coal Co. v. *Strand*, 278 U. S. 142 15
Northern Pacific v. *State Tax Commission*, 297 U. S. 403, affirming 183 Wash. 33, 48 Pac. (2d) 931 8
Paramount v. *Henneford*, 184 Wash. 376; 51 Pac. (2d) 385, certiorari denied 298 U. S. 665 8
People v. *Miller*, 178 N. Y. 194, 70 N. E. 472 15
Puget Sound Power & Light Co. v. *King County*, 264 U. S. 22 8
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389 15
Rhodes v. *Iowa*, 170 U. S. 412 15
State, ex rel Stiner v. *Yelle*, 174 Wash. 402; 25 Pac. (2d) 91 8
Supply Laundry v. *Jenner*, 178 Wash. 72; 34 Pac. (2d) 363 8
Texas Transport v. *New Orleans*, 264 U. S. 150 15
United States v. *California*, 297 U. S. 175 15
United States v. *Erie Railroad*, 280 U. S. 98 15
Wilson v. *Republic Iron & Steel Company*, 257 U. S. 92 9

STATUTES CITED.

Constitution of the State of Washington, Article I,
Section 1 9
Section 4 9
Section 6 9
Judicial Code, Section 237a, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928, (28 U. S. C. A. 344a, 861a and 861b) 5
Laws of Washington, 1933, Chapter 191, pp. 869, et seq., as amended by Chapter 57, Laws of Washington Extraordinary Session, 1933, pp. 157, et seq., and Chapter 180, Laws of Washington, 1935, Sections 4 to 15, pp. 709, et seq., Sections 185 to 210 inclusive, pp. 830, et seq., and Section 216, p. 849 5

Page

Remington's Revised Statutes of Washington, 1932, Vol. I, p. 146 12
422 9
425 9
428 9
Remington's Revised Statutes of Washington, 1932, Volume 4, Section 1716, p. 10 9
Section 1730, p. 31 12
Section 1737, p. 72 9
Section 1740, p. 74 9
Section 1741, p. 75 9
Rules of the Supreme Court of Washington, Rule VIII 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 1000

PUGET SOUND STEVEDORING COMPANY,
A CORPORATION,

Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON AND HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF SAID COMMISSION,

Appellees.

STATEMENT AS TO JURISDICTION.

Filed in Clerk's Office, Supreme Court, State of Washington, April 17, 1937, Benj. T. Hart, Clerk.

Pursuant to Rule 12-1 of the Rules of the Supreme Court of the United States, appellant submits this statement as to jurisdiction showing the basis upon which it contends that this Court has jurisdiction upon appeal to review the action of the Supreme Court of the State of Washington.

This case was submitted to the court of first instance upon the pleadings which consisted of the plaintiff's complaint (R. 1) and the defendants' answer (R. 11). The facts as shown by the pleadings are as follows:

Facts of the Case.

Appellant, Puget Sound Stevedoring Company, is a Washington corporation engaged in the State of Washington in the business of stevedoring. By "stevedoring" is meant the continuous handling of cargo from the hold of a vessel to a "first place of rest" and vice versa.

All cargo discharged, loaded or handled by appellant is, at the time, moving *continuously* in *interstate* or *foreign* commerce, or both, being directly enroute from or to an interstate or foreign point. Appellant does not load, handle or discharge any intrastate or local cargo. While it performs stevedoring services for vessels under United States documentation engaged in the foreign, coastwise, and intercoastal trade, the bulk of its work is handling cargo received from or destined to vessels flying foreign flags.

Appellant's method of operation, which is typical of the industry, is as follows:

Each hold of a vessel is worked by a crew of men who are commonly called a "gang." The "gang" usually consists of the following:

1. Six men in the hold.
2. One or two winch-drivers.
3. A hatch-tender.
4. Two "sling-up men" on the dock.

The men in the hold place the cargo upon a sling which is hoisted by the ship's gear from the hold, swung over the

deck of the vessel and lowered to the dock. There, the ship's gear is disengaged by the two sling-up men and the load, as a *continuous* operation, is hauled away to "first place of rest." Here stevedoring ends in discharging.

In loading a vessel the same method is employed as outlined above, save in the reverse order. Stevedoring, in the loading operation, commences at the point where the cargo begins a *continuous* movement towards the ship's hold. At ship's side the sling, upon which the cargo is usually piled, is attached by the two sling-up men to the ship's tackle. The sling is hoisted over the side by the ship's tackle and lowered into the hold where it is stowed by the hold men.

Stevedoring, in the case of cargo handled through side ports, consists of the movement by truck from the vessel's hold through the side-ports to the "first place of rest", and vice versa.

Appellant furnishes its services under contract or arrangements with a ship owner or ship master. The arrangement may be: (a) To discharge or load cargo at a specified rate per ton, in which case appellant employs individual longshoremen over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master; (b) To load or discharge a vessel on a cost-plus basis, this method differing from (a) only in the fact that the method of compensation is different; (c) To act as labor agent for the ship owner or ship master, supplying him with individual longshoremen to load and discharge the vessel as his employees. Appellant here does not control or direct the operation of the individual longshoremen over whom the ship's officers assume complete supervision and direction. At the completion of the work appellant advances on behalf of the ship owner or ship master the payroll to pay the longshoremen, later billing the vessel and her owner the amount of the payroll plus its commission.

Some vessel owners, instead of employing a stevedoring company at all, employ longshoremen directly as their own employees to perform the necessary stevedoring for their vessels. The nature of the services performed is identical, whether performed by longshoremen as employees of the vessel or whether performed by longshoremen employed by a stevedoring company which loads the vessel under contract.

In the case of inbound cargo the minimum obligation imposed by the bill of lading upon every vessel stevedored by appellant is to discharge the cargo from the hold of the ship and deliver it alongside at ship's tackle. In the case of outbound cargo the minimum obligation imposed by the bill of lading upon every vessel stevedored by appellant is to accept the cargo alongside at ship's tackle and place it in the hold of the vessel. In both cases the carrier absorbs in its freight rate all expenses in connection with the stevedoring of the cargo between the hold of the vessel and the reach of ship's tackle and vice versa.

In some trades the vessel also absorbs stevedoring charges from ship's tackle to the "first place of rest" and vice versa. In the event the carrier does not absorb the stevedoring charges from ship's tackle to the "first place of rest" or vice versa, they are billed to the consignee or shipper as an extra charge. Whether absorbed by the vessel in its freight rate or paid by the consignee or shipper as an extra charge, such stevedoring services are the same.

The crew of a vessel used to do its stevedoring. Now this is unusual. Every seaport of any importance has available at all times competent and reliable stevedoring companies and experienced longshoremen in sufficient numbers to afford quick dispatch of the vessel.

Cargoes, here involved, arriving from interstate or foreign points may be destined to some interior point or may

be delivered to a consignee at the point of discharge. In either event, stevedoring ends with the continuous movement of the cargo from the hold of the vessel to the "first place of rest", and from that point or some further point the cargo may be transported by railroad car, truck, or otherwise, to the final point of destination, or at that point or some further point it may be received by the consignee. So, also, in the case of cargo originating at an inland point or originating in the port of embarkation, stevedoring in either case commences when the cargo begins to move continuously from "first place of rest" towards the hold of the vessel.

Stevedoring charges (in and out) represent approximately one-fourth to one-third of the freight revenue earned by the vessel.

Any interruption in or cessation of stevedoring services curtails and hinders the free and steady flow of commerce and trade through a port in an equal and like degree.

Statute under Which Jurisdiction of Supreme Court is Invoked.

The jurisdiction of this Court is invoked under Section 237-a of the United States Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928 (Title 28, U. S. C., Sections 344-a, 861-a and 861-b).

Statutes of the State of Washington Here Challenged.

The statutes of the State of Washington, the validity of which is involved, are Chapter 191, Laws of Washington 1933 (pp. 869 *et seq.*), as amended by Chapter 57, Laws of Washington Extraordinary Session 1933 (pp. 157 *et seq.*), and Chapter 180, Laws of Washington 1935, Sections 4 to 15 (pp. 709 *et seq.*), Sections 185 to 210, inclusive (pp. 830 *et seq.*), and Section 216 (p. 849). These statutes create

what is commonly known as the "Business and Occupation Tax".

Laws of Washington 1933.

Chapter 191, Laws of Washington 1933, Sec. 2 (2) (p. 871) provides in part:

> "* * * there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against * * * gross income * * * *."

Section 1 (6) (p. 869) provides in part:

> "The term 'gross income' means * * * all receipts, actually received by reason of * * * the business engaged in, * * * without any deduction on account of * * * labor costs, * * * or any other expenses whatsoever * * * *."

Subsequent sections of the Act provide for its administration by the appellees and provide stringent penalties in the event persons subject to the Act fail to comply therewith.

Laws of Washington Extraordinary Session 1933.

It was by Chapter 57, Laws of Washington Extraordinary Session 1933 (pp. 157 *et seq.*), which amended Chapter 191, Laws of Washington 1933 (pp. 869 *et seq.*), that an attempt was first made to subject the business of the appellant to the provisions of the earlier act by the addition of a new section to be known as 2-a. This section provides in part as follows:

> "(1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, * * *

an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *."

Laws of Washington 1935.

Chapter 180, Laws of Washington 1935, Section 4 (p. 709), provides in part as follows:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against * * * gross income of the business, * * * as follows: * * *."

Section 4-(e) (pp. 710 *et seq.*) provides in part as follows:

"Upon every person engaging within this state in any business activity * * * as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. * * *"

Section 5-(g) (pp. 712 *et seq.*) provides in part as follows:

"The term 'gross income of the business' means the * * * compensation for the rendition of services, * * * all without any deduction on account of * * * labor costs, * * * or any other expense whatsoever paid or accrued and without any deduction on account of losses;"

Section 216 (p. 849) provides in part as follows:

"No tax shall be imposed under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933, Extraordinary Session, State of Wash-

ington, with respect to the period beginning May 1, 1935, and ending July 31, 1935, and the provisions of such act shall be deemed amended in conformity herewith * * *."

Other sections of the Act provide for its administration by the appellees and provide stringent penalties in the event persons subject to the Act fail to comply therewith.

The statutes referred to above have been before the Supreme Court of the State of Washington and before the Supreme Court of the United States on several occasions. It is now well settled that the tax is not a property tax. It is an excise tax measured by and imposed upon gross income. It is imposed upon the privilege of engaging in business. It is solely a revenue measure and not an exercise of the police power of the State.

State ex rel. Stiner v. *Yelle,* 174 Wash. 402, 25 Pac. (2d) 91;

Cascade Telephone Co. v. *State Tax Commission,* 176 Wash. 616, 30 Pac. (2d) 974;

Supply Laundry v. *Jenner,* 178 Wash. 72, 34 Pac. (2d) 363;

Paramount v. *Henneford,* 184 Wash. 376, 51 Pac. (2d) 385; certiorari denied 298 U. S. 665;

Northern Pacific v. *State Tax Commission,* 297 U. S. 403, affirming 183 Wash. 33, 48 Pac. (2d) 931;

Fisher's Blend, Inc., v. *Tax Commission,* 297 U. S. 650, reversing 182 Wash. 163, 45 Pac. (2d) 942; 49 Pac. (2d) 115.

Judgment of the Supreme Court of the State of Washington.

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered April 8, 1937 (R. 23). The time for taking an appeal began to run from the date of said judgment. (See *Puget Sound Power & Light Company* v. *King County,* 264 U. S. 22, where the

time for taking an appeal from a judgment of the Supreme Court of the State of Washington is considered). The petition for appeal is presented April 17, 1937 (R. 49).

The judgment and decree of the trial court dated August 3, 1936, provides in part (R. 14):

> "It is by the court ordered, adjudged and decreed that this action be and the same is dismissed with prejudice and with statutory costs."

The judgment of the Supreme Court of the State of Washington affirms the judgment and decree of the trial court (R. 23). A judgment of dismissal is final.

Wilson v. *Republic Iron & Steel Company*, 257 U. S. 92;

Gulf Refining Co. v. *United States*, 269 U. S. 125;

Fisher's Blend, Inc., v. *Tax Commission*, 297 U. S. 650.

Court Appealed From is Highest Court of the State of Washington.

The judgment of the Supreme Court of the State of Washington is that of the highest court in which, under the laws of the State of Washington, such judgment could be had. No further appeal is possible save to the Supreme Court of the United States; hence, the appeal is taken from "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had."

Constitution of the State of Washington, Art. IV, Sections 1, 4 and 6.

See

Remington's Revised Statutes of Washington, 1932, Vol. 1, pp. 422, 425, 428;

Remington's Revised Statutes of Washington, 1932, Vol. 4, Sec. 1716, p. 10;

Section 1737, p. 72; Section 1740, p. 74;

Section 1741, p. 75.

How the Federal Question Was Raised.

The questions sought to be reviewed in this Court were raised in the Superior Court of Thurston County (the court of first instance) by appellant's complaint of which paragraphs III, V, VI and VII are as follows:

"III.

Plaintiff is engaged solely in the business of stevedoring or loading, discharging and handling of cargoes of vessels engaged exclusively in interstate or foreign commerce, or both. Said cargoes while so handled are at all times in continuous movement from the hold of a vessel to first place of rest, or vice versa. A more particular description of the nature and character of the plaintiff's business activities and of the stevedoring industry is attached hereto, marked Exhibits A and B, and made a part hereof.

* * * * * * *

V.

The business activities of the plaintiff are within the exclusive jurisdiction and control of the United States of America. The above tax or excise if enforced against plaintiff is in direct violation of Article I, Section 8 of the Constitution of the United States of America in that said tax or excise imposes a burden, hindrance and obstruction upon interstate and foreign commerce and upon the free and steady flow and movement of the same.

VI.

The imposition of the said tax or excise upon the plaintiff for the privilege of engaging in its business activities in the State of Washington likewise constitutes a denial to plaintiff of the equal protection of the laws in violation of the Fourteenth Amendment, to the Constitution of the United States, and Article

I, Section 12, of the Constitution of the State of Washington, in that said tax or excise is threatened to be imposed upon the business activities of the plaintiff as a contracting stevedore, but same is not imposed upon a ship owner when doing its own stevedoring in lieu of employing the services of an independent contractor such as plaintiff.

VII.

The imposition of the said tax or excise upon the plaintiff for the privilege of engaging in its business activities in the State of Washington is likewise a deprivation of plaintiff's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington, in that said tax or excise is arbitrary, unreasonable, excessive and confiscatory'' (R. 1, 2, 3).

Paragraphs VIII and IX of the complaint set forth equitable grounds for relief (R. 3). An answer admitting the essential facts set out in the complaint was filed in the action by the appellees (R. 11). Both parties moved for judgment on the pleadings and the matter was submitted on the merits to the court for adjudication. The court delivered an oral opinion, a copy of which is attached hereto and made a part hereof. The decision of the trial court expressly stated the objection urged by appellant under the Federal Constitution and upheld the tax as valid thereunder. On August 3, 1936, the trial court entered a final judgment dismissing the action with prejudice, to all of which the plaintiff and appellant duly excepted and its exception was allowed (R. 14). An appeal was taken to the Supreme Court of the State of Washington, the appellant urging in its assignments of error (R. 16) the same constitutional grounds set forth in its complaint. Such assignments of error to the Supreme Court of the State of Wash-

ington appear in Brief of Appellant in that court in accordance with state practice.

Remington's Revised Statutes of Washington 1932, Vol. 4, Sec. 1730, p. 31;

Remington's Revised Statutes of Washington 1932, Vol. 1, p. 146, Rules of the Supreme Court, Rule VIII.

Such assignments of error were in part as follows:

"2. The trial court erred in holding that the appellant is not engaged in Interstate and Foreign Commerce.

* * * * * * *

4. The trial court erred in holding that the imposition and collection from the appellant of the Business and Occupation Tax does not impose a burden, hindrance or obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 (3) of the Constitution of the United States.

* * * * * * *

6. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant, and not upon a ship owner when doing his own stevedoring, does not deprive the plaintiff of the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

* * * * * * *

8. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant does not deprive the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

* * * * * * *

10. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations is an unlawful and illegal bur-

den, hindrance and obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 (3), of the Constitution of the United States.

* * * * * * *

12. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations, and not upon a ship owner doing his own stevedoring, does not deprive the appellant of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States.

* * * * * * *

14. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax law upon appellant deprives the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

The Supreme Court of the State of Washington affirmed the judgment of the Superior Court of Thurston County and in its opinion, copy of which is hereto attached and made a part hereof, expressly set forth as follows the grounds urged by appellant in contending that the application of the Business and Occupation Tax to appellant's operations violated the Constitution of the United States:

"In asserting that the business and occupational tax laws are not applicable to appellant, it is argued that appellant's business activities are within the exclusive jurisdiction and control of the Federal government, inasmuch as the tax, if enforced against appellant would amount to a burden, hindrance and obstruction upon interstate and foreign commerce contrary to Art. I, § 8, of the United States constitution; and further that the imposition of the tax upon appellant would constitute a denial of equal protection of the laws in violation of the fourteenth amendment to the constitution of the United States and of Art. I, § 12, of our state con-

stitution, in that the tax could not be imposed upon shipowners doing their own stevedoring instead of employing the services of an independent contractor, such as appellant. It is finally claimed that the imposition of the tax would deprive appellant of its property without due process of law in violation of the fourteenth amendment to the constitution of the United States and Art. I, § 3, of the constitution of this state, in that such tax is arbitrary, unreasonable, excessive and confiscatory."

The opinion and judgment which the Supreme Court rendered and entered could not have been rendered or entered without denying to appellant all of the rights asserted by it under the constitutional privileges relied upon and said opinion and judgment cannot be rested upon any independent non-Federal grounds.

It is submitted that the judgment plainly and definitely draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States, as required by Section 237 of the Judicial Code, as amended, and that this appeal comes within the proper jurisdiction of this Court.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

Questions Involved are Substantial as Shown by Repeated Decisions of This Court.

The following cases substantiate appellant's contention that one engaged in an essential and component part of, and link in, interstate and foreign commerce is himself engaged in interstate and foreign commerce. It is wholly immaterial that the activities constituting such an essential and component part of, and link in, interstate and foreign commerce are performed wholly within the limits of a single State.

Foster v. *Davenport*, 22 How. 244;

The Daniel Ball, 10 Wall. 557;

Gloucester Ferry v. *Pennsylvania*, 114 U. S. 196;

McCall v. *California*, 136 U. S. 104;
Rhodes v. *Iowa*, 170 U. S. 412;
Texas Transport v. *New Orleans*, 264 U. S. 150;
Hughes v. *Minnesota*, 272 U. S. 469;
Di Santo v. *Pennsylvania*, 273 U. S. 34;
Northern Coal Co. v. *Strand*, 278 U. S. 142;
United States v. *Erie Railroad*, 280 U. S. 98;
United States v. *California*, 297 U. S. 175;
People v. *Miller*, 178 N. Y. 194; 70 N. E. 472;
National Labor Board v. *National New York Co.*, 86 F. (2d) 98.

As appellant is engaged solely in interstate and foreign commerce the imposition of the Business and Occupation Tax of the State of Washington upon its gross receipts is in violation of Article I, Section 8 of the Constitution of the United States.

Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650.

The difference between stevedoring performed by a vessel with its own employees and stevedoring performed by a stevedoring company is a distinction without a difference. The work performed and the individuals performing it in both cases are the same. Appellant contends that the imposition of the Business and Occupation Tax upon its operations and not upon the operations of a vessel doing its stevedoring with its own employees is a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. See

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389;
Colgate v. *Harvey*, 296 U. S. 404.

Respectfully submitted,

BEN C. GROSSCUP,
BERNARD H. LEVINSON,
Attorneys for Appellant.

EXHIBIT "A".

(Copy.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY.

No. 16407.

PUGET SOUND STEVEDORING CORPORATION, *Plaintiff*,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, members of said Commission, *Defendants*.

MEMO. OPINION.

This is an action to enjoin the State Tax Commission from enforcing against the Plaintiff the provisions of the business and occupation tax law (Chapter 191, Laws of 1933 as amended by Chapter 57, Laws of extra session 1933 and Chapter 180, Laws of 1935).

Exhibit "A," attached to the complaint is a concise statement of the nature and scope of Plaintiff's business. From it, I am satisfied that Plaintiff is an independent contractor, locally engaged in furnishing service to carriers engaged in interstate commerce and that Plaintiff is not engaged in interstate commerce and under the cases cited and examined, I am of the opinion that the collection of the tax imposed by the law does not impose a burden, hindrance or obstruction upon interstate commerce.

The fact that the tax is imposed upon stevedoring companies and not upon a ship owner when doing its own stevedoring, does not render the law discriminatory and does not violate the equal protection clause of the Constitution. Neither does the law deprive the plaintiff of its property without due process of law.

A vast number of cases have been cited in the briefs, most of which have been examined and from those ap-

plicable to the facts herein I reach the above conclusion. Judgment may be for defendants, dismissing the action.

JOHN M. WILSON,
Judge.

EXHIBIT "B".

(Copy.)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

DEPARTMENT TWO.

No. 26324.

PUGET SOUND STEVEDORING COMPANY, a Corporation, *Appellant*,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission, *Respondents.*

Filed Jan. 6, 1937.

This is an appeal from a judgment dismissing, with prejudice, an action instituted to secure injunctive relief against the application to and enforcement against appellant of the so-called "Business and Occupation Tax Laws" as contained in Chap. 191, Laws of 1933, as amended and added to by Chap. 57, Ex. Sess. Laws of 1933 and Chap. 180, Laws of 1935.

In asserting that the business and occupational tax laws are not applicable to appellant, it is argued that appellant's business activities are within the exclusive jurisdiction and control of the Federal government inasmuch as the tax, if enforced against appellant, would amount to a burden, hindrance and obstruction upon interstate and foreign commerce contrary to Art. I, § 8, of the United States Constitution and further that the imposition of the tax upon appellant would constitute a denial of equal protection

of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and of Art. 1, § 12, of our state constitution in that the tax could not be imposed upon shipowners doing their own stevedoring instead of employing the services of an independent contractor, such as appellant. It is finally claimed that the imposition of the tax would deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Art. I, § 3, of the constitution of this state in that such tax is arbitrary, unreasonable, excessive and confiscatory.

Appellant, a Washington corporation, is now and for some years past has been engaged solely in the business of stevedoring at different ports within the state. It carries on its business by means of contracts which it makes with shipowners or shipmasters. These contracts are of three types; the first two provide for loading cargo on or discharging it from a ship, appellant employing the stevedores over whom it exercises control and whose operations it directs under general instructions and supervision of the ship's master. These contracts differ only in the method of determining the compensation to be paid appellant. By the third type of contract appellant, for a consideration, merely supplies the stevedores who work under the direction and complete supervision of the ship's officers, appellant advancing the pay to the laborers and thereafter collecting from the shipowner or master the amount of the payrolls, plus commission for services. Under the first two types of contracts the winches and steam for operating them, the booms, cargo-falls, and other deck appliances are usually supplied from the ship, while the slings, trucks and other cargo handling equipment are furnished by appellant. All the cargo handled under all three types of contracts moves in either interstate or foreign commerce or both and most of it is loaded on or unloaded from vessels flying foreign flags. The men hired by or through the company work on the ship or dock, or both. A further fact to be noted is that some shipowners employ stevedores without engaging the services of a stevedoring company and in some instances the ship's crew does the stevedoring work.

We are satisfied that the record fully supports respondent's contention that appellant makes its contracts and renders its services thereunder as an independent contractor. Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. Ed. 480.

The real question, however, is whether the excise tax constitutes such a burden on interstate and foreign commerce as to violate the Federal constitution.

1 Cooley on Taxation, 4th ed., § 374, says:

"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial and not merely incidental and fortuitous. A tax is not invalid merely because it affects interstate commerce and impedes the transit of persons and property from one state to another 'just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.'"

To the same effect is 14 Fletcher on Corporations, Rev. Ed., 431. Both of these texts cite numerous decisions from the United States Supreme Court.

Appellant argues that as it actually participates in the movement of interstate and foreign commerce and as the tax is upon the gross receipts from such commerce, it is a direct tax upon every ton of cargo moved and, hence, is unconstitutional according to McCall v. California, 136 U. S. 104; Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150, and Di Santo v. Pennsylvania, 273 U. S. 34. Without detailing the facts of these three cases it is noted that each involves the imposition of a license tax directly upon the carrier of interstate and foreign commerce. In this case the tax is not imposed upon, or because of the kind of business appellant is engaged in, but rather upon the act or privilege of engaging in business activities without regard to its kind or nature.

A review of most of the authorities cited by counsel for both parties would lengthen this opinion unduly and is not necessary. We shall base our decision upon a few cases

by the United States Supreme Court which are controlling in principle.

Bearing in mind that the business and occupational tax contained in the state revenue act imposes, indiscriminately, an excise tax upon every person for the privilege of doing business in this state; that appellant is a domestic corporation operating an independent business entirely within this state; that the tax is not upon imports, exports or interstate or foreign commerce and that appellant is not a necessary factor in such commerce but has built up and renders an independent service which is advantageous to those who actually form a necessary and component part or link in such commerce, it is inconceivable that the imposition of such an excise conflicts or is inconsistent with any federal or state constitutional provision.

In Ficklen v. Shelby County Taxing District, 145 U. S. 1, that court affirmed a judgment of the supreme court of Tennessee, sustaining a law of that state providing for a tax upon brokers and all persons not having a regularly licensed house of business in the taxing district of Shelby county to pay a tax of ten dollars per week, or twenty-five dollars per month for such privilege. The court said:

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods, situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution.

"The language of the court in Lyng v. State of Michigan, 135 U. S. 161, 166, was: 'We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regu-

lation of it, which belongs solely to Congress.' But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business.

* * * * * * *

"* * * It is well settled that a state has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the state. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196."

In Hump Hairpin Co. v. Emmerson, 258 U. S. 290, it was held that a state law of West Virginia providing for taxing foreign corporations for the privilege of doing local business, which based the tax upon the capital stock actually represented by property located and business transacted within the state, plainly intending not to tax interstate commerce, reasonable as to amount and free from discrimination in favor of local corporations, is not unconstitutional merely because a trifling part resulted from inclusion of interstate business in the basis of computation. Among other things, the court there said:

"While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

Several cases are cited to sustain that principle and the court then continued:

"* * * The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so di-

rectly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

The United States Supreme Court sustained the law, which has been sustained by this court, in Pacific Telephone & Telegraph Co. v. Tax Commission, 56 Sup. Court Rep. 522, and several kindred cases, in which that court held that a state tax upon a local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce, since the question of constitutional validity is not to be determined by artificial standards, but an alleged indirect tax must be judged by its practical operation. It reiterated that while a state may tax the privilege of engaging in local business, it may not tax the privilege of engaging in interstate commerce, and any tax laid directly upon the privilege is void, even in the absence of legislation by Congress or a finding of prejudice.

These cases control and it is needless to go further afield in our inquiry.

The judgment is affirmed.

HOLDCOMB, *J.*

We concur:

MILLARD, *C. J.*
MITCHELL, *J.*
BEALS, *J.*
TOLMAN, *J.*